Winston H. Hickox
Secretary for Environmental Protection

State Water Resources Control Board

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Gray Davis
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AUG 0 6 2003

To: Interested Parties

STATUS OF AQUATIC PESTICIDES PERMITS

State Water Resources Control Board (State Board) staff intends to develop draft general National Pollutant Discharge Elimination System (NPDES) permits for application of aquatic pesticides to replace the current General Permit, Water Quality Order No. 2001-12-DWQ, which expires in January 2004.

Pursuant to the requirements of the Federal Clean Water Act, the U.S. Environmental Protection Agency (USEPA) promulgated water quality criteria for Priority Pollutants in the California Toxics Rule (CTR) and National Toxics Rule (NTR). The State Board Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (Policy) establishes implementation provisions for the determination of reasonable potential and the assignment of effluent limitations for Priority Pollutant criteria in the NTR, CTR, and those objectives established by Regional Water Quality Control Boards in their Water Quality Control Plans (Basin Plans).

The Policy prohibits discharges that would cause exceedances of applicable water quality criteria for Priority Pollutants. Specifically, any aquatic pesticide that contains Priority Pollutants, for example, copper and acrolein, is prohibited from being applied in concentrations that would cause exceedances of applicable water quality criteria outside the mixing zone. The permits will require strict compliance with the CTR criteria, Policy, and Basin Plans beyond the mixing zone.

The Policy does authorize variances from the Priority Pollutant criteria for public entities that discharge pollutants for resource or pest management (Policy section 5.3, Enclosure 1), including discharges of aquatic pesticides. Issuance of permits including such variances is allowed only if the requirements for the variances that are specified in the Policy are met. These requirements include compliance with the California Environmental Quality Act (CEQA). Therefore, the State Board will not be able to adopt a permit with a variance from the CTR criteria without prior compliance with CEQA. We have not received any CEQA documents from dischargers seeking coverage under the new aquatic pesticides permits regarding the section 5.3 exemption from the Policy. (The existing permit did grant variances based on the emergency provisions of CEQA. However, there is no such emergency at this time).

Dischargers seeking a variance would also have to comply with the other requirements in section 5.3, including notifying potentially affected public and governmental agencies, and providing the following information:

> A detailed description of the proposed action which includes the proposed method of completing the action, a time schedule, and a discharge and receiving water monitoring plan that specifies monitoring prior to application events, during application events, and after completion with the appropriate quality control procedures, and any necessary contingency plans.

If your agency desires to obtain a variance from the CTR Priority Pollutant criteria, CEQA documentation and the above information are needed before the State Board can adopt an NPDES permit. Please contact State Board staff if you are interested in applying for a variance and would like to submit the required information.

USEPA has issued Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) concluding that an NPDES permit is not required for application of aquatic pesticides in compliance with FIFRA. State Board legal staff has reviewed USEPA's Interim Guidance and recommended that the State Board not follow the Interim Guidance. Please see enclosed legal memorandum for a detailed discussion of staff's recommendation (Enclosure 2).

If you have any questions or need further assistance, please call me at (916) 341-5615 or Stan Martinson, Chief of the Division of Water Quality, at (916) 341-5458. You or your staff may also call Adam Laputz, Regulations Unit, Division of Water Quality, at (916) 341-5554.

Sincerely,

Celeste Cantú
Executive Director

Enclosures

Policy for Implementation of Toxics Standards
for Inland Surface Waters, Enclosed Bays, and Estuaries of California
State Water Resources Control Board
California Environmental Protection Agency

Section 5.3 - Exceptions

Categorical and case-by-case exceptions to this Policy may be granted pursuant to the provisions below.

Categorical Exceptions
The RWQCB may, after compliance with the California Environmental Quality Act (CEQA), allow short-term or seasonal exceptions from meeting the priority pollutant criteria/objectives if determined to be necessary to implement control measures either:

1. For resource or pest management (i.e., vector or weed control, pest eradication, or fishery management) conducted by *public entities to fulfill statutory requirements, including, but not limited to, those in the California Fish and Game, Food and Agriculture, Health and Safety, and Harbors and Navigation codes; or

2. Regarding drinking water conducted to fulfill statutory requirements under the federal Safe Drinking Water Act or the California Health and Safety Code. Such categorical exceptions may also be granted for draining water supply reservoirs, canals, and pipelines for maintenance, for draining municipal storm water conveyances for cleaning or maintenance, or for draining water treatment facilities for cleaning or maintenance.

For each project, the discharger shall notify potentially affected public and governmental agencies. Also, the discharger shall submit to the Executive Officer of the appropriate RWQCB, for approval:

(1) A detailed description of the proposed action, including the proposed method of completing the action;
(2) A time schedule;
(3) A discharge and receiving water quality monitoring plan (before project initiation, during the project, and after project completion, with the appropriate quality assurance and quality control procedures);
(4) CEQA documentation;
(5) Contingency plans;
(6) Identification of alternate water supply (if needed); and
(7) Residual waste disposal plans.

Additionally, upon completion of the project, the discharger shall provide certification by a qualified biologist that the receiving water beneficial uses have been restored.

Section 5.3 - Exceptions (Continued)

To prevent unnecessary delays in taking emergency actions or to expedite the approval process for expected or routine activities that fall under categorical exceptions, the discharger is advised to file with the appropriate RWQCB, in advance of seeking RWQCB approval, the information required in items (1)-(7) above, to the extent possible.

Case-by-Case Exceptions

Where site-specific conditions in individual water bodies or watersheds differ sufficiently from statewide conditions and those differences cannot be addressed through other provisions of this Policy, the SWRCB may, in compliance with the CEQA, subsequent to a public hearing, and with the concurrence of the U.S. EPA, grant an exception to meeting a priority pollutant criterion/objective or any other provision of this Policy where the SWRCB determines:

1. The exception will not compromise protection of enclosed bay, estuarine, and inland surface waters for beneficial uses; and
2. The public interest will be served.

An example of where a case-by-case exception would be appropriate is where it is necessary to accommodate wastewater reclamation or water conservation.

ENCLOSURE 2

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State Water Resources Control Board

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TO: Tom Howard
Deputy Director
Executive Office

/ s /

FROM: Elizabeth Miller Jennings
Senior Staff Counsel IV
OFFICE OF CHIEF COUNSEL

DATE: July 25, 2003

SUBJECT: UNITED STATES ENVIRONMENTAL PROTECTION AGENCY INTERIM STATEMENT AND GUIDANCE ON APPLICATION OF PESTICIDES TO WATERS OF THE UNITED STATES IN COMPLIANCE WITH THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT DATED JULY 11, 2003

ISSUE

Should the State Board follow the United States Environmental Protection Agency (EPA) Interim Statement and Guidance on Application of Pesticides to Waters of the United States (US) in Compliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), dated July 11, 2003 (Interim Guidance)?

CONCLUSION

The Interim Guidance appears to be in conflict with holdings of the Ninth Circuit Court of Appeals (Ninth Circuit) and the State Water Resources Control Board (State Board) should not follow the Interim Guidance.

DISCUSSION

The purpose of this memorandum is to advise the State Board on whether, under current court cases and federal guidance, it is necessary to have a national pollutant discharge elimination system (NPDES) permit prior to applying aquatic pesticides to waters of the US.

Background: Court Cases and EPA Guidance Documents

In 2001, the Ninth Circuit issued an opinion regarding whether an irrigation district that applied the aquatic pesticide acrolein to an irrigation canal that was tributary to a natural creek needed an NPDES permit. (*Headwaters, Inc. v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526.) The case arose when the district applied the pesticide, it leaked through a waste gate, and 92,000 fish were killed in the downstream creek. The court first addressed standing of the environmental group to bring the case. Pursuant to precedential court decisions, a citizens group must prove the existence of ongoing violations of the Clean Water Act (CWA). The district argued that it had changed its protocol, and that future releases to the creek were unlikely. The court rejected this argument since the claimed violation was discharging the pesticides without a permit, regardless of whether there would be any environmental damage to creeks. The court held that registration and labeling of a pesticide under the FIFRA does not preclude the need for an NPDES permit, and that the failure of the FIFRA label to specify that an NPDES permit is required does not mean that the CWA does not apply. The court then addressed whether application of the pesticide constituted the discharge of a pollutant to waters of the US, thus requiring an NPDES permit. The court found that all of the components for regulation applied, including that acrolein directly poured into water is a pollutant because the residual arolein left in the water after application is a chemical waste and thus a "pollutant."

After the court issued its *Headwater* decision, EPA issued two guidance documents essentially declining to follow the holding. On May 31, 2001, EPA stated that civil enforcement under the CWA for direct application of pesticides waters of the US is a low enforcement priority, providing the pesticide is applied according to FIFRA label instructions and there are no egregious circumstances. On March 29, 2002, EPA stated that the application of an aquatic herbicide consistent with the FIFRA label, in order to ensure the passage of irrigation return flows, falls within the exemption for irrigation return flows from the definition of "point source" and is a nonpoint source activity. As discussed in a memorandum dated April 8, 2002, legal staff had serious questions about the legality of that opinion.

In November 2002, the Ninth Circuit issued another opinion concerning the need for an NPDES for pesticide application. (*League of Wilderness Defenders v. Forsgren* (9th Cir. 11/4/2002) 309 F.3d 1181.) There, the court held that the United States Forest Service must hold an NPDES permit before it sprays insecticides from an aircraft directly into rivers as part of silvicultural activities. In reaching its decision, the court found that the insecticides are pollutants under the CWA. The court also defined the exemption for silvicultural pest control from the definition of "point source" in EPA's regulations to be limited to pest control activities from which there is natural runoff.

Also in 2002, the Second Circuit (in New York) issued an unpublished decision regarding the need for an NPDES permit for application of pesticides for mosquito control in federal wetland areas. (*Altman v. Town of Amherst* (2d Cir. 2002) unpublished.) The lower court had dismissed

a citizens suit, holding that pesticides, when used for their intended purpose, do not constitute a "pollutants" for purposes of the CWA, and are more appropriately regulated under FIFRA. The appeals court vacated the trial court's decision and remanded the matter. In its unpublished decision, the court expressed concern that until EPA articulates a clear interpretation of current law—including whether properly used pesticides released into or over waters of the US can trigger the requirements for NPDES permits—the question of whether properly used pesticides can become pollutants that violate the CWA will remain open. The court asked EPA to participate in the proceedings, and stated that the trial court should decide whether spraying, application, or discharge of pesticides constitutes deliberate discharge of "pollutants" into waters of the US from a point source requiring an NPDES permit, considering an amicus brief of the US, the *Headwaters* decision, as well as other precedent from that court (*Connecticut Coastal Fishermen's Assoc. v. Remington Arms Co.,* 989 F.2d 1305, 1316 (2d Cir. 1993)[skeet shot as a point source]) and the Supreme Court (*Wisconsin Public Intervenor v. Mortier* (US 1991) 501 US 597, 612 [FIFRA does not occupy the field]).

In response to the request by the Second Circuit, EPA issued the Interim Guidance on July 11, 2003. The document states that it is interim, and that EPA will solicit comment on it through publication in the Federal Register prior to taking a final agency position. Until then, the document states that application of pesticides in compliance with FIFRA requirements is not subject to NPDES permitting requirements in two circumstances: (1) application of pesticides directly to waters of US to control pests (e.g. mosquito larvae or aquatic weeds), and (2) application of pesticides to control pests that are present over waters of the US that results in a portion of the pesticides being deposited to waters of the US (e.g. aerial application to forest canopy where waters of US are below the canopy). The rationale for this conclusion is that pesticides applied consistent with FIFRA are not *pollutants* because they are neither "chemical wastes" nor biological materials. Because the pesticides are not pollutants, there is no discharge of a pollutant to a water of the US, and therefore no requirement to obtain an NPDES permit. The explanation of why pesticides do not constitute "chemical wastes" is that if applied consistent with FIFRA, they are products rather than wastes. EPA claims that its guidance is consistent with the "circumstances" of the Ninth Circuit's decision in *Headwaters.* The explanation regarding biological materials (intended to address some of the biological materials used for mosquito abatement) is essentially that if chemical pesticides are not pollutants, it makes no sense to make biological pesticides pollutants either.

Issue: Is a Pesticide a "Pollutant" When Applied Consistent with FIFRA?

A major issue in *Headwaters* was whether the application of pesticides constitutes discharge of a *pollutant.* The specific discharge that instigated the citizens' suit in that case was presumably not in compliance with FIFRA, since the pesticide leaked into the creek at levels that killed 92,000 fish. Normally, a holding in a case will be limited to its facts, and broader statements in a decision, which are not required determinations of the facts in the case, are termed *dicta* and need not be followed in future cases. Thus, EPA, by referring to the "circumstances" of the

Headwaters case implies that to the extent the Ninth Circuit decision stated that *all* applications of aquatic pesticides—including those in compliance with FIFRA—constitute discharge of a "pollutants," the statement is dicta for applications not in compliance with FIFRA, and therefore need not be followed. The weakness with this claim is that the conclusion by the Ninth Circuit--that all applications of aquatic pesticides, *including applications consistent with FIFRA*, constitute discharge of a pollutant--was necessary to the outcome of the case. In order to successfully bring a citizens suit for CWA violations, a plaintiff must prove that the violations are likely to continue. (*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* (1987) 484 U.S. 49, 64.) The defendant irrigation district in *Headwaters* claimed that it had established new protocols, and that no further releases into the creek were likely. The court stated that an NPDES permit was necessary regardless of any impact from the pesticide applications, and therefore continuing violations of the CWA were likely if the district did not obtain a permit. Thus, while the "circumstances" of the *Headwaters* case were application of a pesticide not in compliance with FIFRA, the holding of the case was that any residual for pesticide application constitutes discharge of a pollutant and requires an NPDES permit, whether or not the application was in compliance with FIFRA. Also, in the *Forsgren* case, there is no indication that the pesticide application violated FIFRA.

As discussed above, the latest EPA guidance document, which states that application of pesticides in conformance with FIFRA do not constitute discharge of a "pollutant," appears to be inconsistent with the Ninth Circuit decisions in *Headwaters* and, more recently, in the *Forsgren* case. In weighing the decisions of the federal appeals court that presides over states including California, whose decisions are entitled to "great weight," as opposed to an interim guidance document by EPA that has not been formally promulgated, and which is entitled to some "deference," following the Ninth Circuit decisions is a safer route. Therefore, it appears that the current status of the law in California is that when pesticides are directly applied to waters of the US, or applied directly above waters of the US (which practice is not approved in California in any event), the discharger may violate the CWA if it has not obtained an NPDES permit.

Implications for other programs

It should also be noted that were EPA's theory to be upheld, i.e. a pesticide applied consistent with FIFRA is not a "pollutant," it could have ramifications beyond the issue of whether an NPDES permit is necessary. The Board is required to adopt total maximum daily loads (TMDLs) in some situations where "pollutants" cause exceedance of water quality standards and are placed on a list. (CWA section 303(d).) There are numerous situations in California where pesticides are on the 303(d) list and TMDLs are being prepared. Generally, there is no evidence that these pesticides in receiving waters were the result of application of pesticides in violation of FIFRA requirements. (In fact, in its amicus brief to the court in *Headwaters*, EPA pointed out that the FIFRA nationwide requirements are not adequate to protect individual water bodies.) Exclusion of pesticide residuals from the definition of "pollutant" could hinder these TMDLs. The EPA interim guidance appears to acknowledge this problem, and indeed states in a footnote

that where pesticides are a "waste", such as in discharges of storm water regulated under CWA section 402(p), they are pollutants and require an NPDES permit. The interim guidance does not explain this result, since there is generally no way to tell whether or not the discharges in the storm water were the result of applications in compliance with FIFRA. In any event, the implication for other programs and delineation of when a pesticide becomes a "waste" are not clear in the guidance document.

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